

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

2021 SEP 20 AM 11:49

AXIALL CORPORATION and
WESTLAKE CHEMICAL CORPORATION,

Plaintiffs,

vs.

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA.; ALLIANZ
GLOBAL RISKS US INSURANCE COMPANY;
ACE AMERICAN INSURANCE COMPANY;
ZURICH AMERICAN INSURANCE COMPANY;
GREAT LAKES INSURANCE SE; XL
INSURANCE AMERICA, INC.; GENERAL
SECURITY INDEMNITY COMPANY OF
ARIZONA; ASPEN INSURANCE UK LIMITED;
NAVIGATORS MANAGEMENT
COMPANY, INC.; IRONSHORE SPECIALTY
INSURANCE COMPANY; VALIDUS
SPECIALTY UNDERWRITING SERVICES,
INC.; and HDI-GERLING AMERICA
INSURANCE COMPANY,

Defendants.

JOSEPH M. RUCKI
Civil Action No. 19-C-59

Judge Christopher C. Wilkes

Discovery Commissioner:
Russell M. Clawges, Jr.

**ORDER GRANTING DEFENDANTS'
MOTION FOR RELIEF UNDER RULE 37**

On a previous day to wit, came the parties, Defendants National Union Fire Insurance Company of Pittsburgh, Pa.; Allianz Global Risks US Insurance Company; ACE American Insurance Company; Zurich American Insurance Company; Great Lakes Insurance SE; XL Insurance America, Inc.; General Security Indemnity Company of Arizona; Aspen Insurance UK Limited; Navigators Management Company, Inc.; Ironshore Specialty Insurance Company; Validus Specialty Underwriting Services, Inc.; and HDI-Gerling America Insurance Company;

and Plaintiffs Axiall Corporation and Westlake Chemical Corporation (collectively, the “Parties”), by and through their respective counsel, and presented their respective arguments on Defendants’ Motion for Relief Under Rule 37 (“Motion”). The Discovery Commissioner, having fully considered the arguments of the Parties, enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This matter surrounds an insurance coverage dispute involving Defendants’ alleged failure to cover Plaintiff Westlake Chemical Corporation for property damage at its Natrium Plant in Marshall County, West Virginia caused by a chlorine release on August 27, 2016. Plaintiffs sued Defendants for breach of contract and bad faith in their denial of a March 20, 2019 insurance claim allegedly “in excess of \$278,000,000,” for “physical loss, damages, and expenses caused by or directly resulting from the [chlorine release].” *See* Complaint at ¶ 52.

2. During the course of discovery in this action, Defendants posed pointed interrogatories seeking detailed information regarding Plaintiffs’ support (both technical and financial) for these alleged damages. Specifically, Defendants’ Interrogatory No. 15 requested the following information:

INTERROGATORY NO. 15: Identify with specificity each item of Equipment at the Plant that was damaged and/or failed to function or operate which Plaintiffs attribute to the Release, including within the response the date of the failure, the location of the failed Equipment in the Plant, the failure mode, the damage to the Equipment causing the failure, the date of the original manufacture, purchase, and installation of the failed Equipment, and the date each item of failed Equipment was repaired/replaced.

See Exhibit A to Defendants’ Motion, at p. 5. Plaintiffs failed to adequately respond to this request, and Defendants’ filed a motion to compel Plaintiffs to provide a complete answer.

3. On February 12, 2021, Judge Wilkes entered an Order (“Order”) compelling Plaintiffs to provide a factually detailed response to Defendants’ Interrogatory No. 15. *See id.* Judge Wilkes further concluded, among other things, that the information sought in Interrogatory No. 15 is necessary to allow Defendants an opportunity to evaluate the claimed loss, that said information is “very relevant and important,” and that Plaintiffs had not adequately responded to Interrogatory No. 15. *Id.* at pp. 5-6.

4. Following Judge Wilkes’ Order, Plaintiffs provided a supplemental response to Interrogatory No. 15 on March 15, 2021. *See* Exhibit B to Defendants’ Motion. The supplemental response did not answer the interrogatory with the ordered specificity and otherwise failed to provide the specific information required by Judge Wilkes’ Order, including failing to identify or set forth whether each listed item of property/equipment contained in Exhibits 1 through 15 to the supplemental response: (i) failed to function or operate; (ii) the date of failure; (iii) the failure mode; (iv) the damage causing the failure; (v) the date of original manufacture, purchase, and installation; and (vi) the date of repair/replacement.

5. Defendants pointed out these deficiencies and the non-compliance with Judge Wilkes’ Order and attempted in good faith to resolve the dispute concerning Plaintiffs’ deficient response. Plaintiffs maintained that their supplemental response provided all the factual information ordered to be provided in Judge Wilkes’ Order. Given this impasse, Defendants were forced to seek relief from the Court.

6. On a prior day, Defendants filed the instant Motion and their supporting Memorandum, asking that Plaintiffs be precluded from introducing any evidence of any claimed item of damages for which they have not provided the information set forth in Interrogatory No.

15 and granting any other sanction or award just and proper under the circumstances. Defendants allege in the instant Motion that Plaintiffs have not complied with the Order.

7. On a prior day, Plaintiffs filed their Opposition to Defendants' Motion.
8. On a prior day, Defendants filed their Reply.
9. The Discovery Commissioner finds that the issue is ripe for adjudication.

CONCLUSIONS OF LAW

Rule 37 of the West Virginia Rules of Civil Procedure governs sanctions available when a party fails to comply with a discovery order. More specifically, Rule 37(b)(2) allows courts to order certain sanctions when a party “fails to obey an order to provide or permit discovery.” The sanctions available under Rule 37(b)(2) include a finding of contempt, preclusion of claims or defenses, preclusion of evidence in support of claims or defenses, striking of pleadings or parts thereof, rendering of default, dismissal, and/or an award of costs and attorney’s fees.

Once the moving party has established noncompliance with a discovery order, the burden shifts to the allegedly noncompliant party to show inability to comply or special circumstances that render sanctions unjust. *See Bell v. Inland Mut. Ins. Co.*, 332 S.E.2d 127, 134 (W. Va. 1985); *In re Frieda Q*, 742 S.E.2d 68, 79 (W. Va. 2013). In considering a request for sanctions, courts are allowed to consider the seriousness of the conduct, the impact the conduct had on the case and the administration of justice, any mitigating circumstances, and whether the conduct was a pattern. *See Bartles v. Hinkle*, 472 S.E.2d 827, 836 (W. Va. 1996). If sanctions are granted, courts must ensure that the particular sanction is fashioned to address the identified harm caused by the misconduct. *See Mills v. Davis*, 567 S.E.2d 285, 290 (W. Va. 2002). Conduct that prejudices the wrongdoer’s opponent or hinders the administration of justice may provide a basis for a harsher

sanction than wrongdoing “that, through good fortune or diligence of the court or counsel, fails to achieve its untoward object.” *Hadox v. Martin*, 554 S.E.2d 395, 401 (W. Va. 2001).

In the matter at hand, the Court previously determined that Plaintiffs’ failure to fully respond to Interrogatory No. 15 prejudices Defendants. The prior Order made clear that the information sought, “is very relevant and important to Plaintiffs’ bad faith argument, and Defendants’ ability to defend the same”, and that “Defendants are plainly entitled to have a detailed analysis of damage claims, sufficient to allow them an opportunity to evaluate the loss.” *See* Order, at pp. 5, 6.

Upon review of the materials submitted and consideration of the Parties’ arguments, the Discovery Commissioner now finds the fact that Plaintiffs have failed to obey Judge Wilkes’ Order by failing to provide all of the information requested by Interrogatory No. 15. Plaintiffs’ failure to obey Judge Wilkes’ Order continues to make it impossible for Defendants to evaluate the amount of damages and defend themselves against Plaintiffs’ numerous extracontractual claims. However, an order precluding Plaintiffs from introducing evidence of any damages for which they have failed to provide support in the manner sought by Interrogatory No. 15 is too harsh a sanction at this point. The Discovery Commissioner believes it more appropriate, at this time, to require the Plaintiffs to comply completely with Judge Wilkes’ Order within thirty (30) days of the date of this Order or face an Order precluding Plaintiffs from introducing evidence of any damages for which they have failed to comply with Judge Wilkes’ Order in the manner sought by Interrogatory No. 15.

Defendants’ Motion is therefore **GRANTED** as follows:

Accordingly, it is hereby **ADJUDGED** and **ORDERED** that Defendants’ Motion for Relief Under Rule 37 is hereby **GRANTED**.

It is further **ADJUDGED** and **ORDERED** that the Plaintiffs fully comply with Judge Wilkes' Order as it relates to Interrogatory No. 15 within thirty (30) days of the date of entry of this Order or risk preclusion of the entry of evidence of any damages associated with any equipment for which Plaintiffs did not provide all information requested in Interrogatory No. 15.

It is further **ADJUDGED** and **ORDERED** that the Plaintiffs pay Defendants' attorneys fees and costs for prosecuting this motion. Plaintiffs' counsel shall submit to the Discovery Commissioner with a copy to Plaintiffs' counsel their itemized statement of attorneys' fees and costs. Plaintiffs' counsel shall submit to the Discovery Commissioner any objections to Defendants' counsel's statement of attorneys' fees and costs within ten (10) days. The Discovery Commissioner shall then enter an Order setting Defendants' counsel's award of attorneys' fees and costs.

IT IS SO ORDERED.

The Clerk is directed to send a copy of this Order to counsel of record.

ENTER:

September 17, 2021



Russell M. Clawges, Jr.
Discovery Commissioner

RUSSELL M. CLAWGES, JR.
9 Stewart Farm Lane
Morgantown, WV 26508
September 17, 2021

FILED

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JOSEPH M. RUCKI

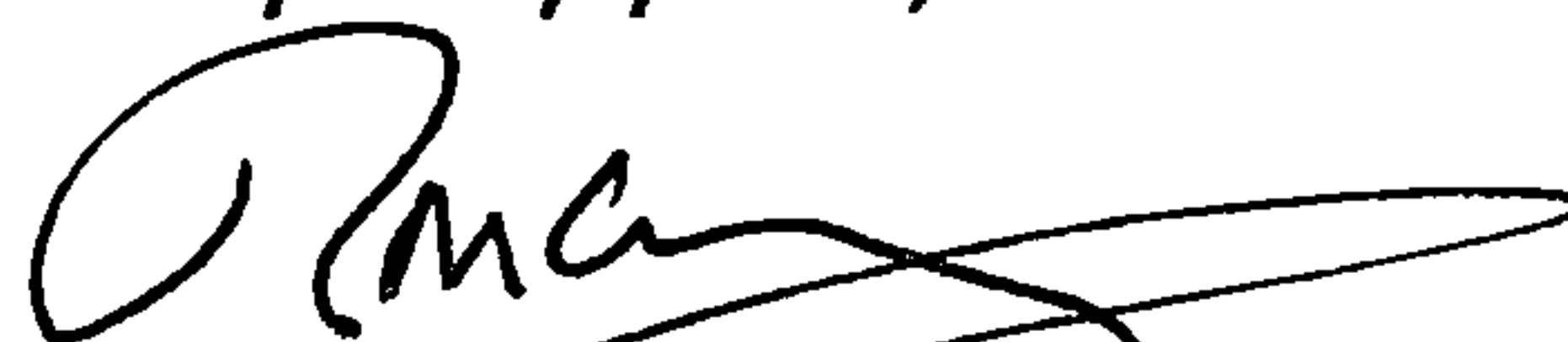
Mr. Joseph M. Rucki
Marshall County Circuit Clerk
600 7th Street, Rm 127
Moundsville, WV 26041

RE: Axiall et al v. National Union et al,
Civil Action No. 19-C-59
Business Court Division

Dear Mr. Rucki,

Enclosed please find two Orders of the Discovery Commissioner in the above-referenced civil action. Please see that these orders are entered and attested copies sent to the parties' counsel. Your cooperation and attention to this matter are appreciated.

Very truly yours,

A handwritten signature in black ink, appearing to read "R. Clawges", with a large, sweeping flourish extending to the right.

Russell M. Clawges, Jr.
Discovery Commissioner